Supreme Court, U.S.
FILED
JAN 22 1991
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 90-792

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LESLIE SALT CO. and CARGILL, INC.,
Petitioners,

v.

UNITED STATES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF *AMICUS CURIAE* AMERICAN MINING CONGRESS IN SUPPORT OF PETITIONERS

Of Counsel:
EDWARD M. GREEN
JAMES E. GILCHRIST
RAISSA V. KIRK
AMERICAN MINING CONGRESS
1920 N St., N.W.
Washington, D.C. 20036
(202) 861-2800

JOHN A. MACLEOD *
STEVEN P. QUARLES
THOMAS C. MEANS
J. MICHAEL KLISE
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2505
(202) 624-2500
Attorneys for Amicus Curiae
* Counsel of Record

January 22, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

Is there any limit to the Army Corps of Engineers' jurisdiction under § 404 of the Clean Water Act, in which Congress authorized the Corps to regulate the discharge of dredged or fill material into "navigable waters"; or are all waters, including all land on which rainwater temporarily collects, subject to the Corps' control?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
STATEMENT	3
ARGUMENT	7
I. THE COURT OF APPEALS' DECISION SHOULD BE REVIEWED BY THIS COURT BECAUSE CONGRESS LIMITED THE CORPS' JURISDICTION TO "NAVIGABLE WATERS," NOT TO THE FULL EXTENT OF THE COMMERCE POWER	7
A. Congress Did Not Authorize The Corps To Regulate To The Limits Of The Commerce Power	8
B. Review Is Especially Important Here Because Courts Will Otherwise Continue To Make The Same Mistake	10
II. EVEN IF CONGRESS INTENDED THE CORPS' § 404 JURISDICTION TO BE CO-EXTENSIVE WITH THE REACH OF THE COMMERCE CLAUSE, THE REGULATION IS INVALID BECAUSE IT EXCEEDS THAT LIMIT	11
CONCLUSION	13

TABLE OF AUTHORITIES

CASES — Page

Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264 (1981) 12
Leslie Salt Co. v. United States, 700 F. Supp. 476 (N.D. Cal. 1989) 5
Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990) 5, 6, 11, 12
Public Citizen v. Burke, 843 F.2d 1473 (D.C. Cir. 1988) 12
United States v. Lambert, 695 F.2d 536 (1983) 10, 11
United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 8, 9, 10

FEDERAL STATUTES

Clean Water Act
§ 404, 33 U.S.C. § 1344 (1988) ..... *passim*
§ 502(7), 33 U.S.C. § 1362(7) (1988) 8
Surface Mining Control and Reclamation Act of 1977
§ 102(m), 30 U.S.C. § 1202(m) (1988) 10

FEDERAL REGULATIONS

33 C.F.R. (1990)
§ 323.2(f) 2
§ 328.3(a) ..... *passim*
§ 330.5(a)(14), (21) 11

MISCELLANEOUS

51 Fed. Reg. 41,206, 41,217 (1986) 11
S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. (1972) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-792

LESLIE SALT CO. and CARGILL, INC.,
Petitioners,

v.

UNITED STATES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF *AMICUS CURIAE* AMERICAN MINING CONGRESS IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The American Mining Congress ("AMC") is an association of the mining companies that produce most of the Nation's metals, coals, and industrial and agricultural minerals, as well as the manufacturers of mining and mineral processing machinery, equipment, and supplies and the engineering, contracting and banking firms that

serve the mining industry. The hundreds of minerals produced by AMC members, ranging from bulk clay, stone, salt, gravel, and cement to the more precious gold, silver, iron, copper, lead, and zinc to the more exotic tungsten, titanium, beryllium, and zirconium, are indispensable to all of American industry, to agriculture (for fertilizer and farm implements, among other things), and to the national defense.

AMC has a compelling interest in the scope of the Corps of Engineers' ("Corps") jurisdiction over "navigable waters" under § 404 of the Clean Water Act ("the Act" or "CWA"), 33 U.S.C. § 1344 (1988), and is adversely affected by the limitless extension of that jurisdiction by the decision of the court of appeals in this case. Under § 404, a permit must be obtained "for the discharge of dredged or fill material" into navigable waters. The Corps' regulations are quite encompassing, however, and extend the Corps' jurisdiction to include numerous activities regularly engaged in by mine operators.[1] Access and haulage roads must be built and a variety of structures must be constructed. Impoundments must be created to supply water for mineral extraction and processing, for fire-fighting, for reclamation, and for waste treatment, to name only a few of the activities potentially subject to Corps regulation. Because AMC mem-

---

[1] For example, the

> *discharge of fill material* means the addition of fill material into the waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses; causeways or road fills; dams and dikes; . . . reclamation devices such as riprap, groins . . .; levees; [*et al.*].

33 C.F.R. § 323.2(f) (1990). In the development, operation, and reclamation of a mine many of these activities must be conducted.

bers must continually dig up, dredge, fill, reshape, reconfigure and then reclaim land in order to produce America's mineral wealth, and are already subject to extensive local, state, and federal land use and environmental strictures governing these activities, they are substantially concerned that the court of appeals' decision will impose additional time-consuming, costly, and potentially preclusive regulatory hurdles. Particularly troubling is the uncertainty the decision creates as to whether there is *any* property over which the Corps cannot now claim regulatory control under the Clean Water Act. For these reasons, AMC submits this brief in support of the petition for certiorari.[2]

STATEMENT

This case arises out of the Corps' issuance of cease and desist orders to Petitioner Leslie Salt Company under § 404 to compel it to stop digging a ditch and siltation pond and plugging a culvert on its own property two miles from San Francisco Bay. Pet. App. A-2. Although part of the property had been incidentally altered by federal and state agency actions that had the effect of hydrologically connecting its southern perimeter with the Newark Slough (a tidal arm of San Francisco Bay), thus creating some wetland features there, the issues raised by the Corps' assertion of jurisdiction over those lands are not the subject of the Petition. Rather, Petitioner seeks review only of that part of the court of appeals' decision concerning the Corps' assertion of jurisdiction over the remainder of the property, consisting of man-made crystallizers and calcium chloride pits once used in manufacturing salt, as "navigable waters" subject to its regulatory control. Pet. 3-4.

In developing its salt production facilities out of dry pastureland in the early part of the century, Petitioner

---

[2] The parties' letters of consent, pursuant to Rule 37 of the rules of this Court, have been filed with the Clerk.

dug pits for depositing calcium chloride and excavated large shallow basins in which the soil was compacted to create watertight earthen containers. Salt brine produced by Petitioner's evaporation ponds located closer to the Bay was pumped into the basins (the crystallizers) to crystallize the salt. After the salt had precipitated and the remaining liquid had been drawn off, the salt was mechanically harvested, and the crystallizers were drained, releveled and recompacted to start the process again. Pet. App. A-2.

Salt production ceased in 1959, but the pits and crystallizers remain. Pet. App. A-2. The property is "dry most of the year" except that rainwater temporarily accumulates, ponding on the land "for a short time immediately after winter rains." Pet. App. A-32, A-34. However, the Corps claimed that the crystallizers and the pits were "navigable waters" subject to its control under § 404 as defined and implemented by 33 C.F.R. § 328.3(a)(3) (1990), which extends Corps jurisdiction beyond "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide" (§ 328.3(a)(1)); beyond "[a]ll interstate waters including interstate wetlands" (§ 328.3(a)(2)); beyond "wetlands adjacent to [other regulated waters]" (§ 328.3(a)(7)); beyond "tributaries of [other regulated waters]" (§ 328.3(a)(5)); beyond "impoundments of [other regulated waters]" (§ 328.3(a)(4)); and beyond the "territorial seas" (§ 328.3(a)(6)), to include also:

> *All other waters* such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, *the use, degradation or destruction of which could affect interstate or foreign commerce* including any such waters:

> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce[.]

33 C.F.R. § 328.3(a)(3) (1990) (emphasis added).

The district court rejected the Corps' jurisdictional claims and held that the crystallizers and pits were not "other waters" subject to regulation under § 328.3(a)(3) because the Act and the regulations did not cover such man-made, artificial "waters," nor did it apply to property that is dry most of the year and only temporarily wet during the rainy season. *Leslie Salt Co. v. United States*, 700 F. Supp. 476, 485-86 (N.D. Cal. 1989), Pet. App. A-15, A-33. Accordingly, the district court did not reach the issue of whether the "use, degradation or destruction of [the temporarily wet pits and crystallizers] could affect interstate or foreign commerce" under § 328.3(a)(3). 700 F. Supp. at 484, Pet. App. A-31.

The court of appeals reversed. *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990), Pet. App. A-1. Finding no impediment to Corps jurisdiction in the man-made, artificial nature of the impoundments, or in the temporary or seasonal nature of the water, the court remanded the case to the district court for it to address the interstate commerce issue. In doing so, however, the court of appeals directed the district court that "[t]he commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local

waters which may provide habitat to migratory birds and endangered species." 896 F.2d at 360, Pet. App. A-12.[3]

Judge Rhymer dissented from the majority on the crystallizers and the pits, reasoning that they were not "other waters" within the scope of § 328.3(a)(3) because the temporary ponding of rainwater "creates no hydrological connection with any other body of water." 896 F.2d at 361, Pet. App. A-13. She also specifically questioned, but found it unnecessary to address, the majority's "hold-[ing] that 'the commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species' " because the real question was not the limits of the commerce power "but whether Congress meant to extend Corps' jurisdiction under the Clean Water Act to the full extent of its commerce clause power." *Id.* at 361 n.1, Pet. App. A-13 to A-14.[4]

---

[3] The court of appeals noted that the Federal Register preamble to § 328.3(a)(3) reflects the Corps' interpretation that any waters which are or could be used as habitat by migratory birds or endangered species satisfy the interstate commerce prerequisite. The court also noted evidence in the record that such a nexus did exist. 896 F.2d at 360, Pet. App. A-11 to A-12.

[4] Judge Rhymer then restated the issue, implying her doubt whether "[it is] reasonable for Corps' jurisdiction to rest on the fact that migratory birds and endangered species may use the waters as habitat?" 896 F.2d at 361 n.1, Pet. App. A-13.

ARGUMENT

It is particularly important that the Court grant review because this case is just the tip of an iceberg that is usually submerged from judicial scrutiny. Unfortunately, because of uncertainty over the proper limits of the Corps' jurisdiction, and because of the potentially crippling costs and delays that can result from a CWA cease and desist order and any subsequent challenge to it, most mining companies and other property owners dare not risk non-compliance with Corps dictates, even when the Corps exceeds apparent statutory limits on its jurisdiction. This case thus represents a rare opportunity to correct a profound problem of agency overreaching. In addition, as explained more fully below, this case is not merely a one-time aberration of little enduring consequence. On the contrary, the court of appeals' decision is only the latest and most extreme example of a line of unreviewed lower court decisions which will proliferate unless this Court steps in.

I. THE COURT OF APPEALS' DECISION SHOULD BE REVIEWED BY THIS COURT BECAUSE CONGRESS LIMITED THE CORPS' JURISDICTION TO "NAVIGABLE WATERS," NOT TO THE FULL EXTENT OF THE COMMERCE POWER.

The court of appeals has effectively written out of the Clean Water Act Congress' express limitation of the Corps' jurisdiction to the Nation's "navigable waters." Unchanneled by that statutory limitation, the Corps' jurisdiction knows no real boundary. Unless this Court acts to rectify this misinterpretation of the Act, the mining industry and all other landowners will be in constant jeopardy of CWA enforcement sanctions (including stiff civil and criminal penalties, as well as injunctive restrictions) as they go about their normal and heretofore lawful use of their nonnavigable lands.

A. Congress Did Not Authorize The Corps To Regulate To The Limits Of The Commerce Power.

The court of appeals erred in skirting past the critical question whether Congress authorized the Corps to regulate to the farthest reaches of the federal commerce power. Indeed, because that is the very premise of the Corps' expansive regulation of "other waters," the court never really questioned whether the regulation was consistent with the Act in the first place, as required by the second stage of the analysis this Court prescribed in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985).[5] The Corps' regulation cannot survive that second-stage analysis.

Congress did not confer such unconstrained jurisdiction on the Corps in § 404 of the CWA. It limited the Corps' jurisdiction to "navigable waters." Admittedly, as this Court has concluded from the legislative history and purposes of the CWA, Congress in defining "navigable waters" as "the waters of the United States," CWA § 502(7), 33 U.S.C. § 1362(7), intended to broaden the Corps' jurisdiction beyond waters that satisfied "traditional tests of navigability," *Riverside Bayview Homes*, 474 U.S. at 133,

> and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term. See S. Conf. Rep. No. 92-1236, p. 144

---

[5] In *Riverside Bayview Homes*, the Court adopted a two-stage analysis for determining whether the Corps may require a permit for placing fill material on property:

> [W]e must determine [1] whether [the] property is [a regulated water] within the meaning of the applicable regulation, and, if so, [2] whether the Corps' jurisdiction over "navigable waters" gives it statutory authority to regulate discharges of fill material into such [class of waters].

474 U.S. at 126.

(1972); 118 Cong. Rec. 33756-33757 (1972) (statement of Rep Dingell).

474 U.S. at 133.

It is one thing, however, to say that Congress intended that the Corps not be bound by traditional notions of navigability and "to regulate at least *some* waters" not previously deemed navigable, *id.* (emphasis added), and quite another to then conclude that Congress intended the Corps to regulate virtually *all* waters and *all* lands on which rainwater may temporarily collect because someone has dug a hole there, permitting migratory birds to habitate briefly there. *See id.* Yet, that is what the Corps has done in promulgating 33 C.F.R. § 328.3(a)(3) and applying it here. Its interpretation of the Act is unreasonable by any standard and deserves no deference.

Congress stopped well short of authorizing the Corps to regulate whatever lands and waters the Commerce Clause could reach. Indeed, it retained the term "navigable waters," a regulatory term of art with longstanding and established significance; it must be presumed that at least *some* element of limitation was intended by those words, and that Congress intended to require *some* meaningful nexus with navigable water as a prerequisite to Corps control. Significantly, the conference report passage to which this Court looked in *Riverside Bayview Homes* did not extend the Corps' powers to the limits of the Constitution, as the Court obviously recognized in expressly leaving open the question of whether the Act conferred jurisdiction over "other waters." 474 U.S. at 131-32 n.8. Rather, the conference committee explained its intent "that the term 'navigable waters' be given the broadest possible constitutional interpretation. . . ." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). Had Congress not intended to anchor the Corps' jurisdiction in "navigable waters," it would have simply authorized the exercise of its unencumbered Commerce Clause powers, as it did in numerous other statutes. *See, e.g.,*

§ 102(m) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1202(m) (1988) (purpose of the statute is "wherever necessary, [to] exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations.").

The court of appeals' decision is founded on a fundamental misinterpretation of the Act. The Petition presents an important question of federal law and should be granted.

B. Review Is Especially Important Here Because Courts Will Otherwise Continue To Make The Same Mistake.

The Court should review the court of appeals' decision because it is not an isolated error or a passing aberration. Although the court below has broadened the jurisdiction of the Corps beyond any previously recognized limit, the panel decision is nonetheless consistent with and a logical extension of a line of unreviewed lower court decisions that, without correction by this Court, threaten to become the illegitimate law of the land.

As did the panel below, several courts of appeals have now embraced the proposition that the Corps' § 404 jurisdiction is coextensive with the commerce power, sequentially citing each other and an unjustifiably expansive reading of the same legislative history to which this Court looked in *Riverside Bayview Homes*. This is illustrated by the statement of the Eleventh Circuit, with string citation in *United States v. Lambert*, 695 F.2d 536 (1983):

> It is generally agreed that Congress intended "waters of the United States" to reach to the full extent permissible under the Constitution. *See United States v. Byrd*, 609 F.2d 1204, 1209 (7th Cir. 1979); *Leslie Salt v. Froehlke*, 578 F.2d 742, 754-55 (9th Cir. 1978);

United States v. Ashland Oil & Transportation Co., 504 F.2d 1317, 1324-25 (6th Cir. 1974).

695 F.2d at 538.

The Corps has proclaimed its plenary jurisdiction over "other waters" in § 328.3(a)(3) because these lower court decisions have gone unreviewed. The Court's guidance is urgently needed now to avoid a continuing misapplication of the Clean Water Act.[6]

II. EVEN IF CONGRESS INTENDED THE CORPS' § 404 JURISDICTION TO BE COEXTENSIVE WITH THE REACH OF THE COMMERCE CLAUSE, THE REGULATION IS INVALID BECAUSE IT EXCEEDS THAT LIMIT.

Although there is no support in the Act or in its legislative history for extending the Corps' jurisdiction to the limits of federal constitutional power, the regulation would in any case be invalid because it exceeds even those broad limits. Both the regulation on its face and the Corps' sweeping interpretive extension of it in its Federal Register rulemaking preamble are defective on that basis.

The regulation improperly provides for Corps jurisdiction over any "other waters . . . the use, degradation or

---

[6] The need for review is not diminished by the fact that the Corps may choose (1) to exempt some impoundments and other facilities or activities, subject to compliance with certain conditions (*see, e.g.*, 33 C.F.R. § 330.5(a)(14), (21) (1990), authorizing nationwide permits for minor road crossing fills and for certain otherwise regulated surface coal mining activities subject to conditions, such as under § 330.5(b) and § 330.8); or (2) to make case-by-case discretionary exceptions (*see, e.g.*, 51 Fed. Reg. 41,206, 41,217 (1986), noted by the court of appeals, expressing the Corps' intent to exempt certain artificially created waters, "subject to jurisdiction on a 'case-by-case' basis of review," 896 F.2d at 360, Pet. App. A-10). An unlawful assertion of jurisdiction gains no legitimacy from the agency's intent to abstain sometimes from actually exercising it.

destruction of which *could* affect interstate . . . commerce including any such waters [which] *could* be used" in a variety of ways such as "by interstate or foreign travelers for recreational or other purposes." § 328.3(a)(3). Predicating agency jurisdiction on such a hypothetical or speculative potential effect on interstate commerce does not pass constitutional muster. First, the "Judiciary does not . . . owe deference to the Executive Branch's interpretation of the Constitution. *See United States v. Nixon*, 418 U.S. 683, 703-05 (1974)." *Public Citizen v. Burke*, 843 F.2d 1473, 1478 (D.C. Cir. 1988). Second, as explained by the Chief Justice, "it [is not] sufficient that the person or activity reached have *some* nexus with interstate commerce. Our cases have consistently held that the regulated activity must have a *substantial* effect on interstate commerce." *Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 310 (1981) (Rehnquist, J. concurring) (emphasis in original). *See also id.* at 312. The regulation's reliance on a merely *potential* effect of *any* magnitude does not meet this standard.

Equally troubling is the Ninth Circuit's imprimatur on the Corps' interpretive extension of the regulation "to local waters which may provide habitat to migratory birds and endangered species." *Leslie Salt*, 896 F.2d at 360, Pet. App. A-12. Whatever legitimacy there may be to the regulation's facial extension to waters which could affect interstate commerce, there can be no justification for predicating federal regulation of local private property solely on the basis that migratory birds may sojourn there. No backyard birdbath or family goldfish pond is safe from federal regulatory control if that is a sufficient effect on interstate commerce to authorize Corps jurisdiction. The regulation, as interpreted and applied to sustain the Corps' jurisdiction over the calcium chloride pits and crystallizers, goes too far.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:
EDWARD M. GREEN
JAMES E. GILCHRIST
RAISSA V. KIRK
AMERICAN MINING CONGRESS
1920 N St., N.W.
Washington, D.C. 20036
(202) 861-2800

JOHN A. MACLEOD *
STEVEN P. QUARLES
THOMAS C. MEANS
J. MICHAEL KLISE
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2505
(202) 624-2500
Attorneys for Amicus Curiae

* Counsel of Record

Dated January 22, 1991